control of the defendant. Pet. App. 11a, *Sereboff*, 407 F.3d, at 218-219; *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer*, 354 F.3d 348, 356-358 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1122 (CA10 2004); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 687 (CA7 2003), *cert. denied*, 124 S.Ct. 2904 (2004). Numerous courts have recognized the disagreement. See, *e.g.*, *Sereboff*, 407 F.3d, at 218-219 & n.7; *Willard*, 393 F.3d, at 1125; *Qualchoice*, 367 F.3d, at 645-647; *Bombardier*, 354 F.3d, at 357-358 & n.43; *Space Gateway Support* v. *Prieth*, 371 F.Supp.2d 1364, 1368 & n.4 (M.D. Fla. 2005); *Eldridge* v. *Wachovia Corp. Long-Term Disability Plan*, 383 F.Supp.2d 1367, 1371 (N.D. Ga. 2005); *Scholastic Corp.* v. *Najah Kassem & Casper & De Toledo LLC*, No. 3:04-CV-1752, 2005 WL 2276042, at *1 (D. Conn. Sept. 19, 2005).

The mere existence of a conflict among the circuits does not, without more, mean that the Court should grant the petition. The Court may reasonably inquire further regarding the depth of the split and the likelihood that it will be resolved without the Court's intervention. The approach of the Sixth and Ninth Circuits is clearly flawed, and a majority of courts (both courts of appeals and district courts) now interpret §502(a)(3) as allowing subrogation involving specifically identifiable funds in the defendant's possession. The Court might reasonably conclude that the Ninth and Sixth Circuits will eventually bring themselves into line with the growing number of courts that permit equitable-subrogation actions under §502(a)(3).

I. The Court Should Deny the Petition Because the Circuit Split May Resolve Itself.

The narrow issue before the Court is whether the recovery Mid Atlantic seeks on behalf of the plan—equitable subrogation in the form of a constructive trust or equitable

lien on an identifiable fund in the defendant's possession—is "appropriate equitable relief" under §502(a)(3) of ERISA. 29 U.S.C. §1132(a)(3). The Court has previously explored the meaning of "appropriate equitable relief" under §502(a)(3). In *Mertens* v. *Hewitt Associates*, the Court rejected a damages claim brought by plan participants against the plan's actuary, explaining that the equitable relief available under §502(a)(3) must have been "*typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." 508 U.S. 248, 256 (1993).

Three years ago, the Court clarified its comments in *Mertens* regarding restitution, explaining that some forms of restitution may not be sufficiently equitable to authorize suit under §502(a)(3). See *Great-West*, 534 U.S., at 215. The Court held that *legal* (as opposed to *equitable*) restitution is not available under §502(a)(3). "Whether [restitution] is legal or equitable in a particular case (and hence whether it is authorized by §502(a)(3)) remains dependent on the nature of the relief sought." *Ibid.* According to *Great-West*, a plaintiff states a claim for equitable restitution when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.*, at 213. On the other hand, a plaintiff seeks legal restitution not cognizable under §502(a)(3) when, in reality, she seeks solely "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money," because such actions are "essentially actions at law for breach of contract." *Ibid.* (quotation omitted). In other words, a restitution claim is considered legal when the plaintiff "could *not* assert title or right to possession of particular property" but nevertheless "might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Ibid.*

The claim in *Great-West* was for legal restitution, reasoned the Court, because the insurance company sought personal

liability against Knudson. See *id.*, at 213-214. The lawsuit could not have claimed a right to possession of specific funds in Knudson's possession, because "the funds to which petitioners claim[ed] an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—[were] not in [Knudson's] possession." *Id.*, at 214. Unlike the Sereboffs' settlement proceeds, which remain in their investment accounts, Knudson's settlement proceeds were located in a special-needs trust that she did not possess or control. *Ibid.* Identifying forms of relief typically available in equity, the Court observed that equitable restitution generally comes "in the form of a constructive trust or an equitable lien," *id.*, at 212-213, which could not have been claimed in the insurance company's suit against Knudson personally.

A. Most Courts of Appeals Agree About How to Resolve the Question Presented in This Case.

Since *Great-West*, several courts of appeals have noted the split of authority over how to apply *Great-West* in determining the true nature of relief sought in ERISA actions like this case. See, *e.g.*, *Sereboff*, 407 F.3d, at 218-219 & n.7 (noting that its approach, as well as that of the Fifth, Seventh, and Tenth Circuits, is "at variance" with the decisions by the Sixth and Ninth Circuits); *Willard*, 393 F.3d, at 1125; *Qualchoice*, 367 F.3d, at 645-647; *Bombardier*, 354 F.3d, at 357-358 & n.43. District courts in circuits that have not taken a position on the question have both recognized the circuit split and have come to different conclusions about how to apply *Great-West* when the plaintiff seeks restitution of identifiable funds in the defendant's possession. See, *e.g.*, *Space Gateway*, 371 F.Supp.2d, at 1368 & n.4; *Eldridge*, 383 F.Supp.2d, at 1367; *Scholastic Corp.*, 2005 WL 2276042, at

*1 ("To date, at least, the Supreme Court has declined to grant a writ of *certiorari* despite the clear circuit conflict.").[1]

The Fourth Circuit has joined the majority position—which the Fifth, Seventh, and Tenth Circuits and an increasing number of district courts have adopted—in deciding that Mid Atlantic was entitled to equitable subrogation of the disputed funds in the Sereboffs' accounts. The majority approach applies a three-part test, derived directly from *Great-West*, to determine whether a remedy sought by a plan is equitable: "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary?" *Bombardier*, 354 F.3d, at 356 (paraphrasing *Great-West*, 534 U.S., at 213); see also *Sereboff*, 407 F.3d, at 218-219; *Willard*, 393 F.3d, at 1122; *Varco*, 338 F.3d, at 687. These courts distinguish *Great-West* on the ground that the disputed funds sought by Great-West were not possessed and controlled by the plan beneficiary.

"By and large, the second group of circuits—the Sixth and the Ninth—have taken the opposite approach to the first group" and have inappropriately "fixated on" and misinterpreted "the basis of the plan's claim." *Scholastic Corp.*, 2005 WL 2276042, at *8. Every case in the circuit split involves a plaintiff ERISA plan that sues a plan participant who has breached the subrogation or reimbursement terms of the plan agreement. *Ibid.* "For the Sixth and Ninth Circuits, the fact that the plan's claim originates in the plan's contract and seeks [money] is entirely determinative of whether the

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[1] Respondent acknowledges that the United States, in response to a call for the views of the Solicitor General in another case involving the same issue under §502(a)(3), has supported the Fourth Circuit's result and mentioned this case as a possible candidate for resolving the disagreement among the courts of appeals. Brief for the United States as Amicus Curiae, at 6 & n.3, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005).

plan is seeking relief that is permissible under ERISA." *Ibid.* For example, the Sixth Circuit in *Qualchoice* reasoned that "the source of the claim . . . [was] a contract to pay money" and that constructive trusts and equitable liens were not traditionally available "in a breach of contract action." 367 F.3d, at 649. In a factually similar suit, the Ninth Circuit recently reaffirmed its refusal to consider subrogation claims for constructive trusts or equitable liens of identifiable funds in the defendant's possession, reasoning that such claims must be disguised breach-of-contract claims arising from the plan agreement. See *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, 384 F.3d 667, 672-673 (CA9 2004), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. Jan. 31, 2005) (No. 04-1049).

B. The Conflict May Resolve Itself Without the Court's Intervention.

Although there is disagreement among the courts of appeals about how to decide when restitution is equitable in nature, the question may be resolved in the near future without review by the Court. Recently, most courts considering the question for the first time have trended toward the approach of the Fourth, Fifth, Seventh, and Tenth Circuits. See, *e.g.*, *Sereboff*, 407 F.3d, at 212; *Bombardier*, 354 F.3d, at 348; *Willard*, 393 F.3d, at 1119; *Space Gateway*, 371 F.Supp.2d, at 1364; *Eldridge*, 383 F.Supp.2d, at 1367; *Scholastic Corp.*, 2005 WL 2276042, at *1; see also *N. Am. Coal Corp.* v. *Roth*, 395 F.3d 916, 917 (CA8 2005), *cert. denied*, __ U.S. __, 2005 WL 1452399 (U.S. Oct. 3, 2005) (No. 04-10618). Although the Sixth Circuit deepened the circuit split just last year, *Qualchoice*, 367 F.3d, at 638, and the Ninth Circuit recently reconfirmed its erroneous interpretation of equitable restitution under §502(a)(3), *Vonderharr*, 384 F.3d, at 667, still, the chronological development of the split and the reasoning of the Sixth and Ninth Circuits

suggest that the Court's intervention may not be required in order for there to be an eventual resolution of the conflict.

Just seven months after the Court decided *Great-West*, the Ninth Circuit became the first circuit to take a position on the question now dividing the courts of appeals. In *Westaff*, the plan fiduciary brought an action "seeking a declaratory judgment that the funds in escrow belonged to it and seeking specific performance of [the plan participant's] obligation to reimburse" the plan. 298 F.3d, at 1166. Observing that the Supreme Court has instructed courts to look at "the 'substance of the remedy sought . . . rather than the label placed on that remedy,'" the Ninth Circuit concluded that the plan fiduciary sought "to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim." *Ibid.* (quoting *Watkins* v. *Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (CA9 1993)). The court expressly indicated that the participant's possession of an identifiable fund did not change the nature of the action. *Ibid.* The Ninth Circuit reached an identical holding two years later in *Providence Health Plan* v. *McDowell*, 385 F.3d 1168 (CA9 2004), reasoning that the fiduciary's claim for specific performance was, "at bottom, . . simply [an] attempt[] to enforce a contractual obligation for repayment." *Id.*, at 1174.

Although the Ninth and Sixth Circuits' recent decisions in *Vonderharr* and *Qualchoice* have deepened the conflict, it is still not beyond reasonable hope that the split will be resolved. These decisions, while in conflict with the decisions of the Fourth, Fifth, Seventh, and Tenth Circuits, do not clearly commit these circuits to their current course, and it is possible that en banc decisions could bring both circuits into alignment with the other circuits.[2] Consequently, a

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[2] Although the Sixth and Ninth Circuits denied en banc petitions in *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638 (CA6 2004), *reh'g en banc denied*, 02-3614 (Sept. 10, 2004), and *Carpenters Health & Welfare Trust for Southern California* v. *Vonderharr*, 384 F.3d 667 (CA9 2004), *reh'g*

decision from this Court does not seem to be the only potential avenue for eventual judicial resolution, and the conflict may ultimately mend itself as more and more courts accept the sound analysis adopted by the Fourth Circuit.

Legislative resolution is also a possibility. Recent proposed legislation—if enacted—would resolve the question presented in the petition and presents an alternative basis for denying the petition. Section 162 of the proposed Healthy America Act of 2005 would amend ERISA §502(a)(3) to explicitly permit "recovery of amounts on behalf of the plan by a fiduciary enforcing the terms of the plan that provide a right of recovery by reimbursement or subrogation with respect to benefits provided to a participant or beneficiary." S. 4, 109th Cong. §162 (2005). Mid Atlantic acknowledges that enactment of the Senate bill is highly unlikely. The bill is lengthy, highly technical, and contains numerous controversial provisions. In addition to clarifying the right of fiduciaries to enforce a plan's subrogation rights under §502(a)(3), the bill aims more broadly to reform the medical-liability system, change tax laws to help low-income individuals and small businesses purchase health insurance, provide grants to faith-based and community organizations to help more families sign up for available health coverage, and cap noneconomic damages and limit contingency fees in medical-malpractice cases. See generally S. 4, 109th Cong. (2005). Given the unpredictability of the legislative process, it is admittedly doubtful that the proposed amendment to §502(a)(3) will be enacted. But, as long as legislative clarification remains a possibility, the Court could reasonably decline to grant the writ in this case.

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en banc denied, 03-55312 (Nov. 3, 2004), that does not mean that the courts might not grant en banc rehearing in a future case in response to the growing circuit precedent in opposition to those courts' view.

II. THE FOURTH CIRCUIT PROPERLY INTERPRETED §502(A)(3) AND THEREBY PROTECTED IMPORTANT FEDERAL INTERESTS.

The Fourth Circuit's analysis properly considers both the source of the fiduciary's claim and the nature of the remedies sought, as *Great-West* requires. The approach of the Sixth and Ninth Circuits—which reflexively bars subrogation claims under §502(a)(3) merely because they involve giving effect *to a contract* and ultimately *seek money*—is misfounded for several reasons.

First, the concern that a plaintiff's reimbursement rights may arise from contract ignores that §502(a)(3) clearly contemplates the provision of "equitable relief" to "redress such violations or . . . to enforce any provisions of . . . the terms of" employee-benefit contracts. 29 U.S.C. §1132(a)(3). A plan fiduciary's route into federal court, after all, is by suing to enforce (or to redress violations of) the terms of an ERISA-plan contract. The fact that a plan's claim is, in this immaterial sense, "contractual" does not even begin to suggest that the relief sought cannot be equitable. As the United States has noted, "[t]his Court has long recognized that a *contractual* obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity. *Barnes* v. *Alexander*, 232 U.S. 117, 121-123 (1914); *Wylie* v. *Coxe*, 56 U.S. 415, 420 (1854). The same rationale applies here."[3] Although *Great-West* excludes a claim that seeks only "to impose personal liability . . . for a contractual obligation," 534 U.S., at 210, the plans in these cases, rather than seeking personal financial liability from the participants' pockets, have asserted a right to a limited portion of a settlement paid into their accounts from a third-

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[3] Brief for the United States as Amicus Curiae, at 7-8, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005).

party tortfeasor—an extant enrichment in the defendant's possession that belongs in good conscience to the plan. In this case, the plan fiduciary does not seek personal liability against the Sereboffs, but an equitable lien or constructive trust on particular "recoveries from a third party" in the defendants' possession that "must be used to reimburse the Company . . . to reflect that portion of the total recovery which is due the Company for benefits paid." Pet. App. 38a.

Second, the basis of the plans' claims is clearly equitable. The mere fact that the plan fiduciaries "may also have a right to recover from [the plan participants] for breach of contract does not alter the equitable nature of the suit to enforce an equitable lien to recover from a designated fund money rightfully owed" to the plans. *Scholastic Corp.*, 2005 WL 2276042, at *12. As the Court has consistently affirmed for over a century, "'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.'" *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 137 n.12 (1962) (quoting *Memphis & L.R.R. Co.* v. *Dow*, 120 U.S. 287, 301-302 (1887)). One of the American "standard current works" on equitable remedies, which *Great-West* advised courts to consult, 534 U.S., at 217, explains that an insurer's subrogation right is driven by the fundamentally equitable desire to prevent unjust enrichment, rather than to make the insurer whole through breach-of-contract damages: "When the insurer's case is based upon the subrogation right, . . . principles of unjust enrichment are controlling, because in this context equitable lien is merely a remedy for preventing unjust enrichment." 4 GEORGE E. PALMER, LAW OF RESTITUTION §23.18(d), at 470 (1978). Moreover, the leading English treatise on restitution explains that "subrogation was known to the Chancellor in the seventeenth century," even before the common law developed legal restitution, and that subrogation "arises independently of, and 'not by force of,' contract and will be granted if it is just

and equitable to do so." ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION §3-004, at 123 (Gareth Jones ed., 6th ed. 2002).[4]

Third, the approach of the Sixth and Ninth Circuits inexplicably discounts the fact that the nature of the relief sought by the plans—a constructive trust or equitable lien—is quintessentially equitable. *Great-West*, 534 U.S., at 213. Furthermore, the fact that the plaintiffs ultimately seek money is not, of itself, a bar to recovery under §502(a)(3). *Ibid.* ("[A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.").

In addition to being correct as a matter of law under *Mertens* and *Great-West*, the Fourth Circuit's approach protects important federal interests. The enforceability of subrogation rights affects millions of employers and employees who participate in ERISA plans. When enforced in a manner consistent with the Fourth Circuit's decision, reimbursement and subrogation reduce the costs of health care coverage by allowing ERISA plans to use subrogation recoveries to pass on savings to employers and employees in the form of lower health care costs. If employees' medical

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[4] Moreover, the plans' subrogation claims are unmistakably analogous to a subcontractor's equitable-subrogation claim against a landowner. When the landowner has set aside a designated fund to pay the general contractor as work progresses, a subcontractor who has performed services on the land but has not yet been paid may assert a right of subrogation and seek an equitable lien on the fund in order to prevent the contractor from recovering twice: once in the form of the subcontractor's unpaid services and a second time in the form of money from the landowner paid into the designated fund. *Scholastic Corp.*, 2005 WL 2276042, at *11 (citing 3 DAN B. DOBBS, LAW OF REMEDIES §12.20(3), at 470 (2d ed. 1993)).

expenses skyrocket, so does a company's liability. Enforcing the kind of reimbursement and subrogation rights at issue in this case—in which a plan participant has received medical benefits from the plan, later recovers money subject to the reimbursement provisions of the plan, and controls those funds in an identifiable account—not only prevents the participant's unjust enrichment but protects the financial viability of employer-sponsored plans.[5]

Finally, by joining the majority position, the Fourth Circuit's decision has furthered the federal interest in making the interpretation of ERISA more uniform. Many ERISA fiduciaries and employers operate nationally and want ERISA to apply consistently across jurisdictions. When enforcement of subrogation clauses is inconsistent, ERISA fiduciaries find themselves in the unfortunate situation of having to weigh their options when deciding where to bring suit.[6]

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[5] As petitioners acknowledge, the Department of Labor and the Solicitor General have recognized that enforcing the plans' subrogation and reimbursement rights in this context safeguards the important federal interest in ensuring the continued financial stability of plan assets. Pet. 14-15 & nn.15-16; see also Brief for the United States as Amicus Curiae, at 10, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005).

[6] Without foundation, the petitioners conclude that Mid Atlantic engaged in forum shopping when it filed suit in the District of Maryland. Pet. 17. That baseless allegation ignores that, from an early stage in the California litigation, Mid Atlantic asserted that the plan agreement was a Maryland contract, that the petitioners were at all relevant times Maryland residents, that Mid Atlantic's headquarters are located in Maryland, and that the Fourth Circuit had not decided the issue presented when Mid Atlantic instituted this action.

CONCLUSION

The Court may reasonably deny the petition if the Court concludes that imminent resolution of the circuit split is not immediately necessary.

Respectfully submitted,

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